Office-Supreme Court, U.S.
FILED
NOV 21 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

Nos. 611 and 623

JOHN P. LOMENZO, Secretary of State of the State of New York and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,
Appellants,

and

JOHN H. HUGHES and LAWRENCE M. RULISON,
Intervenors-Appellants,

against

WMCA, INC., R. PETER STRAUS, JOSEPH DEMAIO, EDWARD LIND, S. THOMAS DELANEY, EDWARD C. BROWN, JAMES J. McCAFFERTY,
Plaintiffs-Appellees,

and

PAUL R. SCREVANE, President of the City Council of the City of New York; EUGENE H. NICKERSON, County Executive, Nassau County; FRANCIS X. O'ROURKE, Chairman, Board of Supervisors, Westchester County; ARTHUR CROMARTY, Chairman, Board of Supervisors, Suffolk County; MAURICE J. O'ROURKE, JAMES POWER, JOHN R. CREWS, THOMAS MALLEE, Commissioners, Board of Elections, New York City,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

LEONARD B. SAND
Robinson, Silverman, Pearce, Aronsohn & Sand
230 Park Avenue
New York, N. Y. 10017

MAX GROSS
Concourse Plaza Hotel
Bronx, N. Y. 10451
Attorneys for Plaintiffs-Appellees

LEO A. LARKIN
Corporation Counsel of the City of New York
Municipal Building
New York, N. Y. 10007
Attorney for Defendants-Appellees Paul R. Screvane and Maurice J. O'Rourke, James Power, John R. Crews and Thomas Mallee

JACK B. WEINSTEIN
County Attorney of Nassau County
Nassau County Exec. Building
West Street
Mineola, New York
Attorney for Defendant-Appellee Eugene H. Nickerson

ROBERT B. McKAY
Vanderbilt Hall
Washington Square
New York, N. Y.
Attorney for American Jewish Congress, American Civil Liberties Union, N.A.A.C.P. Legal Defense and Educational Fund, Inc., Parties Amici Supporting Plaintiffs-Appellees

INDEX

PAGE

Statement 2

Argument 5

Conclusion 9

CITATIONS

Cases

Brown v. *Board of Education*, 349 U. S. 294 6

Fortson v. *Toombs*, No. 300, Oct. T. 1964 ..... 5fn, 8fn

Mann v. *Davis*, Civ. 2604 E.D. Va., Order, Sept. 18, 1964 ..... 5fn

Matter of Sherrill v. *O'Brien*, 188 N. Y. 185 ..... 7fn

M'Culloch v. *Maryland*, 4 Wheat. 316 7

Parsons v. *Buckley; Hoff* v. *Buckley*, Nos. 624-625, Oct. T. 1964 ..... 5fn

Reynolds v. *Sims*, 377 U. S. 533 ..... 5, 6

Thigpen v. *Meyers*, No. 5597, W. D. Wash., Decree, Oct. 5, 1964 ..... 5fn

WMCA, Inc. v. *Lomenzo*, 377 U. S. 633 ..... 2, 5, 8

Statutes

New York State Constitution:

Article III, §2 7

Article XIX, §1 7

Miscellaneous

XI Court Decisions on Legislative Apportionment, Nat. Munc. League, Sept. 1964 ..... 5fn

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

Nos. 611 and 623

JOHN P. LOMENZO, Secretary of State of the State of New York and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, *Appellants,*

and

JOHN H. HUGHES and LAWRENCE M. RULISON, *Intervenors-Appellants,*

against

WMCA, INC., R. PETER STRAUS, JOSEPH DEMAIO, EDWARD LIND, S. THOMAS DELANEY, EDWARD C. BROWN, JAMES J. MCCAFFERTY, *Plaintiffs-Appellees,*

and

PAUL R. SCREVANE, President of the City Council of the City of New York; EUGENE H. NICKERSON, County Executive, Nassau County; FRANCIS X. O'ROURKE, Chairman, Board of Supervisors, Westchester County; ARTHUR CROMARTY, Chairman, Board of Supervisors, Suffolk County; MAURICE J. O'ROURKE, JAMES POWER, JOHN R. CREWS, THOMAS MALLEE, Commissioners, Board of Elections, New York City, *Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, plaintiffs-appellees WMCA, Inc., R. Peter Straus, *et al.*, move that the judgment of the district court be affirmed. In this motion they are joined by defendants-appellees Paul R. Screvane, President of

the City Council of the City of New York, Eugene H. Nickerson, County Executive of Nassau County, and the Commissioners of the Board of Elections of the City of New York.

Statement

This is a direct appeal from an order entered on August 4, 1964 by a three-judge district court in implementation of this Court's decision in *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633, decided on June 15, 1964.

On June 24, 1964 (Tr. 28), appellees served a proposed order on mandate.[1] It followed precisely the prayer for relief of the complaint which had been filed on May 1, 1961 (Tr. 28). The proposed order would have declared the existing apportionment provisions invalid and enjoined the conduct of any election pursuant thereto. It would have further provided that the court proceedings be recessed until July 27, 1964 to enable the state authorities themselves to take implementing action (R. 2-7).

Upon the issuance of this Court's mandate, on Saturday, July 11, 1964, the district court ordered a hearing on July 15, 1964 to "hear the suggestions of all parties with reference to proper remedies, under equitable principles, that it would be desirable to adopt for the purpose of implementing the mandate of the Supreme Court of the United States" (R. 8).

The appellants filed no papers at or prior to the July 15 hearing (Tr. 13), took the position that the November 1964 elections should proceed under the existing, concededly invalid, apportionment formula (Tr. 11) and made no suggestions for implementation of this Court's decision prior to the November 1966 election (Tr. 16, 26).

---

1. This action was taken prior to the issuance of this Court's mandate. Appellees had, however, requested that appellants sign a stipulation to have the mandate of this Court issue forthwith. No such stipulation was signed by appellants (Tr. 10).

At the conclusion of the July 15 hearing, the district court declared the present scheme of apportionment to be "unconstitutional and void" but did not enjoin the conduct of an election thereunder and recessed until July 24 [subsequently amended to July 27] "to await action, if any, by the duly constituted authorities of the State of New York in the light of this declaration and to hear any further representation by the parties litigant toward further implementation of the judgment of the court" (Tr. 78-79). At the July 15 hearing, Judge Ryan indicated (Tr. 54) that it might be advisable for appellees to be prepared, on July 27, with a specific plan for an actual reapportionment of the State.

By July 27, 1964, the State had taken no implementing action and appellees submitted a proposed Further Order on Remand (R. 125-245) which would have provided that "unless on or before August 3, 1964 the legislature of the State of New York shall have enacted and the Governor shall have signed a valid reapportionment law to apply to the next election to be held of the state legislature, this court will, on August 3, 1964, promulgate an order adopting, as an interim measure effective until such time as the State shall enact a valid reapportionment, one of the plans annexed hereto * * *". Annexed to appellees' proposed order were three reapportionment plans, each of which would have been effective prior to the November 1964 election.

Appellants submitted a proposed order which would merely have permitted the November 1964 election to be held under the existing unconstitutional apportionment formula and again made no representations or suggestions as to any implementation of this Court's decision prior to the November 1966 election (R. 253-255).

It was against this background that the court on July 27th, after several hours of deliberation (Tr. 193), promulgated the order which is the subject of this appeal. That order permitted the November 1964 election to be conducted under the existing apportionment:

> "* * * provided that the terms of said Members so elected on November 3, 1964, or at any special election to fill vacancies, shall expire on December 31, 1965, and providing further that not later than April 1, 1965, the Legislature shall have enacted into law a valid reapportionment scheme that is in compliance with the XIV Amendment of the United States Constitution and which shall be implemented so as to effect the election of Members of the Legislature at the election in November, 1965. Members so elected to hold office for a term of one year ending December 31, 1966." (J. St. 12)[2].

Immediately prior to the oral announcement of this order, Judge Waterman stated (Tr. 193):

> "You will note that it does not prevent the voluntary action within the timetable set forth of either the Governor or the Legislature."

In other words, the district court explicitly left it open to the Governor and Legislature to adopt a valid reapportionment prior to the November 1964 election, thus preserving the normal two-year term of office and eliminating the need for an additional election in 1965.

No implementing action was taken by the State and this appeal was noted by appellants (R. 474-478) and by two state senators who, on August 24, 1964, were granted leave to intervene as defendants (R. 472-473; 479-483).

---

2. References designated "J. St." are to the Appellants' Jurisdictional Statement. The Jurisdictional Statement of Intervenors-Appellants is referred to as "Int.-App. J. St.".

Argument

The sole question presented by this appeal is whether the equitable powers of the district court enabled it to promulgate an order which: (a) permitted, as a matter of grace, a continuation of the existing unconstitutional malapportionment for only one, but not for two years, although the state constitution provides for a two-year term of office, and (b) set a deadline of April 1, 1965 for the adoption by the State of a valid apportionment. Such power clearly exists and has been exercised by courts in other reapportionment cases.[3] A contrary conclusion would frustrate reasonably prompt compliance with this Court's decisions and would impose a severe restraint upon the adoption, under equitable principles, of implementing orders. The appeal presents no substantial question and the order of the district court should be affirmed.

In remanding this case to the district court, this Court charged it with the responsibility of determining "under equitable principles" the date by which the New York State Legislature must be based upon a constitutionally valid apportionment. *WMCA, Inc.* v. *Lomenzo*, 377 U. S. at 655. See also *Reynolds* v. *Sims*, 377 U. S. 533, 585.

---

3. For example, the term of office of legislators has been reduced by court order in *Mann* v. *Davis*, Civ. 2604, E.D. Va., opinion and order dated Sept. 18, 1964, application for stay denied by the Chief Justice, Oct. 28, 1964, and in *Thigpen* v. *Meyers*, No. 5597, W.D. Wash., Decree, Oct. 5, 1964.

In some instances far more sweeping orders have been entered. See, *e.g.*, *Fortson* v. *Toombs*, No. 300, Oct. T. 1964, probable jurisdiction noted Oct. 12, 1964. For modification of this Order, see Motion to Dismiss, No. 300, pp. 19-21. See also *Parsons* v. *Buckley*; *Hoff* v. *Buckley*, Nos. 624-625, Oct. T. 1964. For other implementing orders, see opinions collected in XI Court Decisions on Legislative Apportionment, Nat. Munc. League, Sept. 1964.

Compare *Brown* v. *Board of Education*, 349 U. S. 294, 300 (1954) where this Court wrote:

> "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs".

There is no question that, under *Reynolds* v. *Sims*, *supra*, the district court could have ordered an immediate reapportionment. However, if appellants' contention is sound, the district court would have been limited to a choice between ordering such an immediate reapportionment or permitting the continuation of the unlawful condition for a period of two years (J. St. 5). Appellees had urged that sufficient time remained prior to the November 1964 election for an immediate reapportionment to be effective, but appellants strongly resisted this contention. Moreover, appellants offered not a single suggestion or representation as to any implementing action which they were willing to take which would have been effective prior to November 1966. It ill behooves appellants, therefore, to complain about the inconvenience and expense occasioned by the election ordered by the district court in 1965. And, surely the private interest of intervenors-appellants in avoiding the additional campaign expense they would incur should they become candidates for the State Senate in November 1965 (Int.-App. J. St. 7-8) hardly furnishes a basis to continue for an additional year the violation of the individual constitutional rights of the over 16,000,000 citizens of the state.

Appellants argue (J. St. 10) that nothing in the United States Constitution conflicts with a two-year term for state legislators. But this position overlooks the ele-

mentary constitutional principle that, when otherwise innocuous provisions of state law become vehicles for frustrating compliance with the Federal constitution, they may be temporarily suspended. "It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operation from their own influence." *M'Culloch* v. *Maryland*, 4 Wheat. 316, at 427.

The court below did not void the provisions of Article III, Section 2, of the New York state constitution relating to dates of elections and terms of legislators[4]. The court merely suspended their operation until 1966 when New York State elects both a governor and a legislature. By employing the device of two successive one-year terms, the three-judge court not only brought the election of the legislature and the governor back into phase, but also gave the legislature additional time to enact a valid reapportionment scheme, without depriving the citizens of New York State of their constitutional rights for an unconscionably long period of time. Recourse to the amendment procedure contained in Article XIX of the New York state constitution would have been of no avail because, if that provision were applied, reapportionment of New York would be delayed until at least 1969 (see Article XIX, Section 1) with the result that the people of New York would be denied fair representation for five more years.

In requiring that New York be reapportioned by April 1, 1965, the three-judge court did not take the New York

4. Contrary to appellants' suggestion (J. St. 8), there would be no substance whatever to any challenge directed at the validity of legislative enactments based on an allegation that the legislature was not elected in conformity with the state constitution. *Matter of Sherrill* v. *O'Brien*, 188 N. Y. 185, 211-213.

legislature by surprise. WMCA originally brought suit in May 1961. This Court's remand of the case in 1962, *WMCA, Inc.* v. *Simon*, 370 U. S. 190, served to notify the State that its reapportionment scheme was of questionable validity[5] and the decision of this Court on June 15, 1964, of course, left no doubt. Reapportioning New York State within the time allotted is not an onerous task for the legislature. With limited means, appellees prepared, in twelve days, three different plans (R. 125-196). The Governor has already announced that he will call a special session of the outgoing legislature to meet in early December 1964 to adopt a new apportionment. New York Times, Oct. 20, 1964, p. 32.[6]

Appellants seek to bolster their contentions by references to statements made by individual members of the court during oral argument at the July 15 and July 27 hearings (J. St. 7). We fail to see any significance to expressions of doubt by a single judge in view of the fact that, after deliberation, that judge joined in the unanimous decree of the court. Equally without merit, is the contention (J. St. 7), similarly based on colloquy during argument, that the district court believed that it was compelled by the Supremacy Clause to enter its order. The district court made explicit in its orders of July 11 (R. 8), July 15 (Tr. 79) and July 27 (J. St. 12, ¶3) that it was engaged in a process of weighing the equities in order to formulate a proper remedy that would meet local

5. The Governor announced at that time that he was ordering a special staff study on the need for reapportionment. Affidavit of R. Peter Straus, R. 9, 10; New York Times, June 11, 1962, pp. 1, 26. The results of the study have never been made public.

6. If, as a result of what occurs at any legislative session or as a result of any other developments occurring subsequent to the promulgation of the order of the district court, a modification of that order seems appropriate, an application for such modification may be made to the district court which has retained jurisdiction of this case. Cf. *Fortson* v. *Toombs, supra*, p. 5, fn. 3.

conditions and be desirable under all the circumstances. In language and in action, the district court demonstrated that it properly discharged its responsibility to determine "under equitable principles" what form of order would best adjust and reconcile public and private needs and would best serve the interests of the people of New York State.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial question. The order of the three-judge district court should be affirmed.

Respectfully submitted,

LEONARD B. SAND,
Robinson, Silverman, Pearce, Aronsohn & Sand
MAX GROSS,
Attorneys for Plaintiffs-Appellees.

LEO A. LARKIN,
Attorney for Defendants-Appellees Paul R. Screvane and Maurice J. O'Rourke, James Power, John R. Crews and Thomas Mallee.

JACK B. WEINSTEIN,
Attorney for Defendant-Appellee Eugene H. Nickerson.

ROBERT B. MCKAY,
Attorney for American Jewish Congress, American Civil Liberties Union, N.A.A.C.P. Legal Defense and Educational Fund, Inc., Parties Amici Supporting Plaintiffs-Appellees.

November 1964

MICRO CARD 22
TRADE MARK ®

MATTHEW BENDER & COMPANY
MB
69-7543
m
microcard

PC22743